89-1539

No.

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1989

STATE OF NORTH CAROLINA,

Petitioner,

v.

EUGENE DAVIS, JR.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

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QUESTION PRESENTED

Whether submission to the jury at a capital sentencing hearing of both the aggravating circumstance that the murder was committed during the commission of a robbery and the aggravating circumstance that the murder was committed for pecuniary gain was a violation of the defendant's rights under the Eighth and Fourteenth Amendments?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The State of North Carolina prays that a Writ of Certiorari issue to review the judgment of the North Carolina Supreme Court, entered on December 7, 1989, which set aside Respondent Davis' sentence of death and remanded for a new capital sentencing hearing.[1]

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1 The parties to this proceeding are the Petitioner, State of North Carolina, hereinafter referred to as "State," and Respondent, Eugene Davis, Jr., hereinafter referred to as "Davis".

OPINIONS BELOW

The Opinion of the Supreme Court of North Carolina is published at 325 N.C. 607, 386 S.E.2d 418 (1989). A copy is included in the Appendix to this Petition. (Appendix A at A-1).

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on December 7, 1989. The jurisdiction of this Court to review that judgment is invoked pursuant to 28 U.S.C. § 1257 and Rule 10.1(b) and (c) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the United States Constitution.

U.S. Const. Amend. VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. XIV, § 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 12, 1984, defendant was indicted by the Wake County Grand Jury for the first-degree murder and common law robbery of Vivian Whitaker which occurred on March 1, 1985. Trial of these cases began at the 7 October 1985 Criminal Session of Wake County Superior Court, Raleigh, North Carolina.

The evidence for the State tended to show as follows:

Vivian Whitaker, a seventy-year old widowed grandmother, lived in a home for senior citizens and the handicapped in Raleigh, North Carolina. Mrs. Whitaker limped, dragged her leg, and used a cane because of a stroke she had suffered several years before her death.

On March 1, 1984, several people saw or spoke to Mrs. Whitaker, and she was okay prior to 6:00 p.m. At about 6:25 p.m., Davis, entered the building and went to the floor on which his own mother and Vivian Whitaker lived. Between 6:30 and 8:00 p.m., several people in the building heard bumping noises, furniture being dragged, raised voices, and a woman's voice crying for help, all coming from the direction of Mrs. Whitaker's apartment.

Shortly after 8:00 p.m., a Raleigh police officer found Mrs. Whitaker lying dead, face up in the middle of her living room floor. The apartment was in total disarray, had been ransacked, and

things were in a mess. The body was in the midst of and on top of some of the ransacked items. The victim had bruises, abrasions, and scratches on her neck, and had severe internal injuries to her ribs, lungs, liver, diaphragm, heart, and neck. In the opinion of the pathologist repeated blows of blunt force caused all of the non-neck injuries, and those injuries preceded the death which was caused by manual strangulation with the hands. Spermatazoa was found to have been present in both the vagina and the rectum of Mrs. Whitaker, and there was a slight amount of fecal material about her left buttock.

Davis' fingerprints and palm prints were matched to latent prints lifted from the victim's jewelry box, a coffee can in which the victim kept money and jewelry, and two separate sections of that afternoon's local newspaper which were found under the victim's body.

Within an hour of the time the victim was found, respondent Davis was in another part of Raleigh selling a ring, a radio, and necklaces. The ring and radio were identified as items owned by the victim and in her possession shortly before her death. Upon his arrest, Davis had in his possession a package of Silver Virginia Slims cigarettes and a beige Bic lighter. Vivian Whitaker smoked Virginia Slims cigarettes and kept them in a green cigarette case found empty in her apartment after her death. Just prior to her death, Mrs. Whitaker had been given a beige Bic lighter, and it had been on her dresser the night before her death.

Davis presented no evidence at the guilt phase.

On November 1, 1985, the jury found the defendant guilty of common law robbery and guilty of first-degree murder on the basis of malice, premeditation and deliberation and under the felony murder theory.

On November 15, 1985, following a capital sentencing hearing, the same jury found the following aggravating circumstances: defendant was engaged in the commission of common-law robbery, the murder was committed for pecuniary gain, and the murder was especially heinous, atrocious, or cruel.

The jury found twenty-five mitigating circumstances. Among these were the following statutory circumstances: defendant had no significant history of prior criminal activity, the murder was committed while defendant was under the influence of mental or emotional disturbance, defendant's capacity to appreciate the criminality of his conduct or to conform to the requirements of the law was impaired, and defendant's age at the time of the murder. The remaining nonstatutory mitigating circumstances pertained to the abuse and neglect defendant suffered during childhood, defendant's good conduct during and since his arrest, defendant's amenability to rehabilitation, defendant's mental condition, and his minimal history of criminal activity.

Upon finding that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, and that the aggravating circumstances were sufficiently substantial to call for the death penalty, the jury recommended a sentence of death. The Honorable J. Milton Read, Jr., sentenced Davis to death on the first-degree murder conviction and to ten years on the common law robbery conviction, said sentences to run consecutively. Davis gave notice of appeal on November 18, 1985. On 22 August 1988, the North Carolina Supreme Court allowed Davis' motion to bypass the North Carolina Court of Appeals in the robbery case. On December 7, 1989, the North Carolina Supreme Court issued a written opinion finding no error in either conviction but ordering a new hearing as to sentence in the first-degree murder case. *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418 (1989). The North Carolina Supreme Court, in a 4-3 decision, held that the trial court erred by allowing the jury to find both that the murder was committed while Davis was engaged in the commission of common law robbery, N.C.G.S. § 15A-2000(e)(5), and that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NORTH CAROLINA SUPREME COURT HOLDING THAT SUBMISSION TO THE JURY AT A CAPITAL SENTENCING HEARING OF BOTH THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED DURING A ROBBERY AND THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN WAS A VIOLATION OF DEFENDANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT IN *GREGG v. GEORGIA*, 428 U.S. 153, *reh den*, 429 U.S. 875 (1976) and *LOWENFIELD v. PHELPS*, 484 U.S. ___ (1988).

In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, *rehearing denied*, 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976), the trial jury found as the only aggravating circumstances both that the murder was committed during commission of a robbery and that the murder was committed for pecuniary gain.[2]

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2 "purpose of receiving money and automobile." *Gregg v. Georgia*, *supra*, 428 U.S. at 161, 49 L.Ed.2d at 868.

Faced with the same aggravating factor combination which confronted the North Carolina Supreme Court in the present case, this Court held that imposition of the sentence of death against that defendant was not arbitrary and capricious, was not cruel and unusual punishment, and did not violate the Eighth or Fourteenth Amendments to the United States Constitution. *Gregg v. Georgia*, *supra*, 428 U.S. at 158, 162, 188, 200, 207, 49 L.Ed.2d at 866, 868, 883, 890, 893.

In *Lowenfield v. Phelps*, 484 U.S.___, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), this Court found no constitutional violation in the imposition of a sentence of death where the only aggravating circumstance found by the jury in the sentencing phase essentially duplicated a factor which the same jury had found to raise the murder to the level of a capital murder. *Lowenfield v. Phelps*, *supra*, 98 L.Ed.2d at 579-583. In so doing, this Court held that such "double-counting" did not run afoul of the constitutional requirement that

> "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)."

In the present case, ignoring or misinterpreting the opinions of this Court set forth in *Gregg* and *Lowenfield*, the North Carolina Supreme Court held that the trial court erred in allowing the jury in the capital sentencing hearing to consider and find both the aggravating circumstance that the murder was committed while the defendant was engaged in the commission of armed robbery, N.C.G.S. § 15A-2000(e)(5), and the circumstance that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6) [3] State v. Davis, *supra*, (Appendix A at A-30).

In its 4-3 majority opinion, the North Carolina Court based its holding on its same errant 4-3 holding in *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987), with the same three justices dissenting and finding no constitutional violation. Id, (Appendix A at A-30, 34). In its opinion, the North Carolina Court failed to set forth any "clear or express indication that 'separate, adequate, and independent' state law grounds were the basis for the court's judgment."[4]

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3 The North Carolina statutory provisions governing capital punishment do not prohibit "double-counting" of aggravating factors. *See* N.C.G.S. § 15A-2000 (attached as Appendix C at A- 58) and *State v. Quesinberry*, *supra*, 319 N.C. at 240, fn.1. (attached as Appendix B at A- 52).

4 In *Caldwell v. Mississippi*, 472 U.S. 320, 327 105 S.Ct. 2633, 2638-39, 86 L.Ed.2d 231, 238 (1985), this Court reaffirmed its holding in *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), that it "will not assume that a state court decision rests on adequate and independent state grounds when the 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law and when the adequacy and independence of any state law ground is not clear from the face of the opinion.'"

In *Quesinberry, supra*, the Supreme Court of North Carolina was confronted with a capital case in which the only aggravating circumstances submitted to and found by the jury in the sentencing phase of the trial were that the murder was committed while defendant was engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5), and that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6).[5]

Speaking to the assignment of error in that case related to submission of both factors, a 4-3 majority of the Supreme Court of North Carolina stated:

> "Defendant contends that submitting both factors violates due process and renders the capital sentence arbitrary and capricious. Under the particular facts of this case, we find defendant's contention that it was error to submit both factors meritorious."[6]

State v. Quesinberry, supra, 319 N.C. at 236 (Appendix B at A-46. This holding is in direct opposition to this Court's ruling eleven years earlier in *Gregg*.

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5 This is the same set of circumstances which this Court considered in *Gregg*.

6 In a prior case, *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the North Carolina Supreme Court upheld a sentencing hearing where both aggravating circumstances at issue here were submitted to the jury. The majority opinion in *Quesinberry* came only after that defendant alleged that "submitting both factors violates due process and renders the capital sentence arbitrary and capricious."

In *Davis*, the same 4-3 majority of the North Carolina Supreme Court, again ignoring or misinterpreting *Gregg*, and in the face of this Court's further elucidation in *Lowenfield*, again ruled in opposition to this court's interpretation of the United States Constitution.

Factual finding by a capital sentencing jury in North Carolina of both the aggravating circumstance that "the murder was committed while the defendant was engaged in the commission of robbery" and the circumstance that "the murder was committed for pecuniary gain" is not a violation of the Eighth and Fourteenth Amendments to the United States Constitution under the holdings of this Court in *Gregg* and *Lowenfield*. The opinions of the North Carolina Supreme Court in *Quesinberry* and *Davis* are in direct conflict with this Court's holdings in those cases. This Court should review and reverse the judgment of the North Carolina Supreme Court setting aside the sentence of death and requiring a new capital sentencing hearing in this case.

II. THE NORTH CAROLINA SUPREME COURT'S DECISION IS ALSO IN CONFLICT WITH DECISIONS OF OTHER STATE COURTS ON THE VERY SAME ISSUE.

There is serious disagreement among the courts of several jurisdictions which have confronted this same issue over the last several years. Although the courts of several jurisdictions have properly interpreted this Court's holding in *Gregg*, several courts have ignored or misinterpreted this Court's opinion regarding the Eighth and Fourteenth Amendments.

In direct opposition with this Court's holding in *Gregg*, and prior to *Lowenfield*, the Eighth Circuit Court of Appeals, in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985), held that allowing a sentencing jury to find an aggravating factor of pecuniary gain in a felony murder case based on robbery was an improper duplication which violated a defendant's Eighth and Fourteenth Amendment rights under the United States Constitution.[7]

In *Cook v. State*, 369 So.2d 1251 (1979), the Alabama Supreme Court similarly errantly held that it was improper, in a case where a defendant was convicted of first-degree murder on the theory of premeditation and deliberation, to submit both the aggravating factor of commission during a robbery and the aggravating factor of commission for pecuniary gain.[8]

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7 The Eighth Circuit Court of Appeals has now properly held that *Lowenfield* overruled its ruling in *Collins*. *Perry v. Lockhart*, 871 F.2d 1384, 1393 (8th Cir. 1989); *Singleton v. Lockhart*, 871 F.2d 1395, 1401 (8th Cir. 1989).

8 In 1981, the Alabama legislature amended the sentencing statute of that state to specifically provide for "double-counting": "The fact that a particular capital offense . . . necessarily includes one or more aggravating circumstances . . . shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence." Ala. Code Sec. 13A-5-50 (1982 & Supp. 1986).

In *Provence v. State*, 337 So.2d 783 (Fla. 1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), the Florida Supreme Court held that it was improper to submit and allow the jury to find both the aggravating factor that the murder was committed during a robbery and the aggravating factor that the murder was committed for pecuniary gain. Confronting the issue that one factor referred to a defendant's act while the other factor referred to a defendant's motive, the Florida Court improperly reasoned that "both subsections refer to the same aspect of the defendant's crime."[9] *Id*, at 786.[10]

Properly interpreting *Gregg* and the United States Constitution, the Delaware Supreme Court has ruled in accordance with this Court's holding in *Gregg*. In *Flamer v. State*, 490 A.2d 104 (Del. 1983), and *Deputy v. State*, 500 A.2d 581 (Del. 1985), *cert. denied*, 480 U.S. 940, 107 S.Ct. 1589, 94 L.Ed.2d 778 (1987), the Delaware Supreme Court held that it was not improper to submit aggravating factors of both commission during a robbery and commission for pecuniary gain. In so doing, the Delaware Court considered

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9 The North Carolina Supreme Court in *State v. Quesinberry, supra*, considered and improperly relied on the Florida Supreme Court's reasoning in *Provence*. *State v. Quesinberry, supra*, 319 N.C. at 239-40. (Appendix B at A- 51).

10 Although the Eleventh Circuit Court of Appeals has properly held *Lowenfield* allows the finding of robbery as an aggravating factor in a robbery-felony murder, *Bertolotti v. Dugger*, 883 F.2d 1503, 1527-28 (11th Cir. 1989), that same court has issued an opinion indicating it would hold impermissible the submission and finding of both the aggravating factors of robbery and pecuniary gain. *Funchess v. Wainwright*, 772 F2d 683, 692 (11th Cir. 1985)

and rejected the reasoning of the Florida Supreme Court in *Provence*, specifically noting that the Florida Court had apparently not considered the opinion of this Court in *Gregg v. Georgia*, *supra*. *Flamer v. State*, *supra*.

In the most recent of several cases raising this issue in Mississippi since 1982, the Mississippi Supreme Court, in *Wiley v. State*, 484 So.2d 339 (Miss. 1986), *cert. denied*, 479 U.S. 906, 107 S.Ct. 304, 93 L.Ed.2d 278, *reh. denied*, 479 U.S. 999, 107 S.Ct. 604, 93 L.Ed.2d 604 (1986), held that it was not improper to allow double counting of the aggravating factors of robbery and pecuniary gain. The Federal Courts responsible for reviewing the Mississippi capital sentencing scheme have issued rulings similar to the Mississippi Supreme Court's rulings and consistent with this Court's opinions. In a murder-kidnapping case in which the defendant argued [11] that an automatic aggravating factor of commission of murder during commission of a felony would be found by the jury in a felony murder conviction, the Fifth Circuit Court of Appeals rejected the defendant's misperception of the Eighth Amendment and found no constitutional violation. *Gray v. Lucas*, 677 F.2d 1086, 1104-05 (5th Cir. 1982), *cert. denied*, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983). In a robbery-murder, where the jury found both robbery and pecuniary gain as aggravating factors, the District Court for the Southern District of Mississippi rejected the defendant's argument that the finding of two aggravating factors based on the same set of facts was a constitutional violation. *Edwards v. Thigpen*, 595 F. Supp. 1271, 1286 (S.D. Miss. 1984), *aff'd*, 849 F.2d 204 (5th Cir. 1988), *cert. denied*, ___U.S.___, 109 S.Ct. 1329, 103 L.Ed.2d 597 (1989), *reh. denied*, ___U.S.___, 109 S.Ct. 1772, 104 L.Ed.2d 207 (1989).

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11 In making his argument, the defendant cited *State v. Cherry*, 298 N. C. 86, 257 S.E.2d 551 (1979), *cert . denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed. 796 (1980), which was a case relied on by the North Carolina Supreme Court in deciding *Quesinberry*, *supra*.

The Georgia Supreme Court has also properly allowed the submission and finding by the sentencing jury of both the aggravating factors of robbery and pecuniary gain. *Jarrell v. State*, 216 S.E.2d 258 (Ga. 1975); *Gregg v. State*, 210 S.E.2d 659 (Ga. 1974), *aff'd, Gregg v. Georgia,supra.*

In *State v. Jones*, 749 S.W.2d 356 (Mo. 1988), *cert. denied*, ___U.S.___, 109 S.Ct. 186, 102 L.Ed.2d 155 (1988), the Missouri Supreme Court found no violation in allowing both the aggravating factor of commission during a robbery and the aggravating factor of commission for pecuniary gain to be submitted to and found by a capital sentencing jury. In so doing, the Missouri Court emphasized the different facets of greed and use of force in the aggravating factors involved.

The North Carolina Supreme Court was confronted with the holdings and reasoning of *Gregg*, *Flamer*, *Wiley*, and *Jones* in the State's effort to convince that court to reverse its improper holding in *Quesinberry*. However, the 4-3 majority of that court has stubbornly refused to abandon its improperly-reasoned holding in spite of this Court's opinions indicating that the courts of Delaware, Georgia, Mississippi, and Missouri have reached the correct interpretation of the application of the Eighth and Fourteenth Amendments to the United States Constitution.

It is clear that there is a division of opinion on this issue in the several jurisdictions which have thus far confronted this issue over the years since Gregg. This Court should review and reverse the judgment of the North Carolina Supreme Court in this case to definitively settle the legal question at issue and resolve the difference in treatment of this issue among the courts of the various jurisdictions.

CONCLUSION

The North Carolina Supreme Court's decision is an improper pronouncement on an important issue of federal constitutional law which this Court should, and ultimately, must settle. It is in conflict with decisions of this Court as well as with the courts of several other jurisdictions.

The State Legislature of North Carolina and several other states have provided a statutory capital sentencing scheme whereby a sentencing jury may consider as aggravating factors both the actions (robbery) and the motive (pecuniary gain) of a defendant who commits a murder during a robbery. Sixteen of the thirty-seven states which have death penalty statutes[12] allow the sentencing jury to consider and find as aggravating factors both the circumstance that the murder was committed during commission of a robbery and the circumstance that the murder was committed for pecuniary gain.

By its prior decisions in *Gregg* and *Lowenfield*, this Court has indicated that such a statutory procedure is constitutionally permissible as not involving a defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution. Courts in several jurisdictions which have confronted this specific issue over the last several years have reached different results regarding the constitutionality of allowing both robbery and pecuniary gain as aggravating factors. This same issue, which has been a recurring issue in several jurisdictions, will recur in those and other jurisdictions with similar difference in results without further guidance from this Court. The issue has now percolated sufficiently in several jurisdictions to be ripe for review by this Court. A definitive ruling squarely on this issue is

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12 Alabama, California, Colorado, Connecticut, Delaware, Florida, Georgia, Kentucky, Mississippi, Missouri, Nevada, New Jersey, North Carolina, South Carolina, Utah, and Wyoming.

necessary to resolve the conflict among the several jurisdictions and ensure proper interpretation of the Eighth and Fourteenth Amendments in accordance with the decisions of this Court.

The State of North Carolina respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the North Carolina Supreme Court herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the foregoing PETITION FOR WRIT OF CERTIORARI upon the attorney of record by placing same in the United States mail, first-class postage prepaid, addressed as follows:

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This the ___ day of March, 1990.

William P. Hart
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Attorney for Petitioner